

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
TPO, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Corporation Franchise Tax :  
under Article 9-A of the Tax Law  
for the Years f/y/e 9/71-9/72. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of October, 1980, he served the within notice of Decision by certified mail upon TPO, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

TPO, Inc.  
61 Broadway  
New York, NY 10006

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
3rd day of October, 1980.

Arthur Bank

Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
TPO, Inc. :

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for Redetermination of a Deficiency or a Revision :  
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Corporation Franchise Tax :  
under Article 9-A of the Tax Law  
for the Years f/y/e 9/71-9/72. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of October, 1980, he served the within notice of Decision by certified mail upon Rueben S. Leibowitz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Rueben S. Leibowitz  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
3rd day of October, 1980.

Walter Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

October 3, 1980

TPO, Inc.  
61 Broadway  
New York, NY 10006

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Rueben S. Leibowitz  
Oppenheim, Appel, Dixon & Co.  
One New York Plaza  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
TPO INCORPORATED  
for Redetermination of a Deficiency or  
for Refund of Franchise Tax on Business  
Corporations under Article 9-A of the  
Tax Law for the Fiscal Years Ended  
September 30, 1971 and September 30, 1972.

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DECISION

Petitioner, TPO Incorporated, 61 Broadway, New York, New York 10006, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal years ended September 30, 1971 and September 30, 1972 (File No. 21780).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 29, 1978 at 10:45 A.M. Petitioner appeared by Oppenheim, Appel, Dixon & Co. (Reuben S. Leibowitz, CPA). The Audit Division appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed its Claims for Credit or Refund of Corporation Tax Paid for the fiscal years ended September 30, 1971 and September 30, 1972.

II. Whether for New York State income tax purposes, the statute of limitations is tolled during the period when a consent executed by petitioner and the Internal Revenue Service is in effect.

FINDINGS OF FACT

1. On June 14, 1972, petitioner, TPO Incorporated, filed its New York State Corporation Franchise Tax Report (CT-3) under Article 9-A of the Tax Law

for the fiscal year ended September 30, 1971.

2. On February 21, 1973, petitioner filed its New York State Corporation Franchise Tax Report (CT-3) under Article 9-A of the Tax Law for the fiscal year ended September 30, 1972.

3. On June 10, 1974, petitioner filed its New York State Corporation Franchise Tax Report (CT-3) under Article 9-A of the Tax Law for the fiscal year ended September 30, 1973. Petitioner had received an extension of time to June 15, 1974 in which to file said Report.

4. On January 10, 1977, petitioner filed Claims for Credit or Refund of Corporation Tax Paid (CT-8) for the fiscal years ended September 30, 1971 and September 30, 1972. Petitioner sought to carry back to the aforesaid fiscal years a net operating loss sustained in the fiscal year ended September 30, 1973. On July 28, 1977, both of the claims were denied as untimely.

5. On October 4, 1977, petitioner filed a Petition for Redetermination of a Deficiency or for Refund of Tax for the fiscal years ended September 30, 1971 and September 30, 1972.

6. Petitioner and the Internal Revenue Service executed a waiver of the statute of limitations for the years 1971 through 1975, which waiver was in effect at the time the refund claims were filed.

#### CONCLUSIONS OF LAW

A. That section 1087(d) of the Tax Law provides in pertinent part:

"A claim for credit or refund of so much of an overpayment under article nine-a as is attributable to the application to the taxpayer of a net operating loss carryback shall be filed within three years from the time the return was due for the taxable year of the loss..."

B. That the definition of the term "due date" is as follows:

"Time appointed or required for filing a tax return and, in the event of an extension of time to file return, is the date to which period for filing is extended." Black's Law Dictionary 589 (rev. 4th ed. 1968).

C. That in numerous sections and subsections of the Tax Law, the term "due date" is used in conjunction with the phrase "as determined without regard to any extension of time granted to the taxpayer" or a phrase similar thereto. The failure of section 1087(d) to include such limiting phrase creates an ambiguity. When ambiguous or doubtful, a tax statute must be construed strictly against the taxing authority and liberally in favor of the taxpayer. Matter of Suffolk County Federal Savings and Loan Ass'n. v. Bragalini, 5 N.Y.2d 579 (1959); Metropolitan Convoy Corp. v. City of New York, 2 N.Y.2d 384 (1957); Matter of Grumman Corp. v. Board of Assessors, 2 N.Y.2d 500 (1957).

D. That petitioner filed its claims within the statutory period, as computed by including the extension of time granted to it; said claims were therefore filed in a timely manner. Matter of Park Appliance & Furniture, Inc., State Tax Commission, May 16, 1980; Matter of United Artists Corp., State Tax Commission, November 16, 1979.

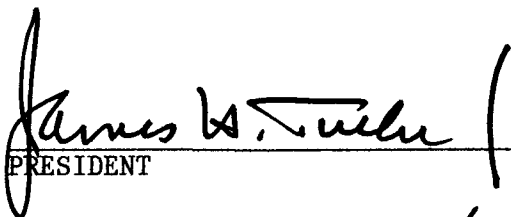
It is thus unnecessary to reach a decision on the second issue presented.


E. That the petition of TPO Incorporated is hereby granted.


DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER